Supreme Court, U.S.
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No. 98-942

In the

Supreme Court of the United States

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, NEBRASKA, NEVADA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, VIRGINIA AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE FEDERAL CONSTITUTION DOES NOT REQUIRE THE RETROACTIVE APPLICATION OF THE PENNSYLVANIA SUPREME COURT'S *SCARPONE* DECISION TO FINAL CONVICTIONS 4

A. Fiore's Conviction Violates *Winship* Only if the *Scarpone* Decision Applies Retroactively to Final Convictions 4

B. The Federal Constitution is Silent Regarding the Retroactivity of State Court Decisions Construing State Law 6

C. The States Should Retain the Option to Decide Whether to Apply New Constructions of State Criminal Statutes Retroactively 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Bailey v. United States,
516 U.S. 137 (1995) 7, 8

Bousley v. United States,
523 U.S. 614 (1998) 2, 7, 8, 10, 14

Carron v. State,
427 So. 2d 192 (Fla. 1983) 10

Chicot County Drainage Dist. v. Baxter State Bank,
308 U.S. 371 (1940) 15

Commonwealth v. Fiore,
665 A.2d 1185, 1193 (Pa. Super. Ct. 1995),
appeal denied, 675 A.2d 1243 (Pa. 1996) 6

Davis v. United States,
417 U.S. 333 (1974) 8

Edwards v. Arizona,
451 U.S. 477 (1981) 11

Great Northern Ry. Co. v.
Sunburst Oil & Refining Co.,
287 U.S. 358 (1932) 7, 9

Griffith v. Kentucky,
479 U.S. 314 (1987) 7, 16

Hickson v. State,
640 P.2d 921 (Nev. 1982) 14

In re Winship,
397 U.S. 358 (1970) 2, 4-6

Jackson v. Virginia,
443 U.S. 307 (1979) 4-6

Kerns v. Grammar,
416 N.W.2d 253 (Neb. 1987) 13

La Rue v. McCarthy,
833 F.2d 140 (9th Cir. 1987) 9

Linkletter v. Walker,
381 U.S. 618 (1965) 6, 7, 11, 13, 15, 16

Mapp *v. Ohio*,
376 U.S. 643 (1961) 11, 15, 16

People v. Hill,
648 N.E.2d 455 (1995) 12, 13

People v. Ryan,
626 N.E.2d 51 (N.Y. 1993) 12, 13

People v. Smith,
35 Cal. 3d 798 (1984) 9, 10

Scarpone v. Commonwealth,
596 A.2d 892 (Pa. Commw. Ct. 1991) . . . 5, 6, 9, 12, 17

Shields v. Wainwright,
813 F.2d 1123 (11th Cir. 1987) 10

Solem v. Stumes,
456 U.S. 638 (1984) 11

State v. Ellis,
333 N.W.2d 391 (Neb. 1983) 13

State v. Howard,
564 N.W.2d 753 (Wis. 1997) 14

State v. Peete,
517 N.W.2d 149 (1994) 14

Stovall v. Denno,
388 U.S. 293 (1967) 7

Teague v. Lane,
489 U.S. 288 (1988) 16, 17

United States v. Johnson,
457 U.S. 537 (1982) 7, 15

Wainwright v. Stone,
414 U.S. 21 (1973) 7, 9

STATUTES AND LEGISLATIVE MATERIALS:

18 U.S.C. § 924(c)(1) 7, 8

35 Pa. Cons. Stat. § 6018.401(a) (1993) 5

OTHER MATERIALS:

Blackstone, Sir William
Commentaries 69 (15th ed. 1809) 6

Gray, John Chipman
Nature and Sources of the Law 222 (1st ed. 1909) 6

INTEREST OF THE AMICI CURIAE

In the 70 years since being confronted with the question, this Court has not wavered from its holding that the Constitution does not require the retroactive application of state court decisions construing state law. In reliance on this longstanding precedent, the States have adopted various approaches to addressing the retroactive application of judicial decisions. The amici States submit this brief because they have an abiding interest in maintaining flexibility in this area and avoiding a federal "one size fits all" retroactivity rule.

The States' interest is more than an abstract desire to continue serving as "laboratories of democracy." Retroactivity rules have a direct impact on the administration of justice. The States have looked to a variety of factors in determining the extent to which state court decisions should be applied retroactively, not the least of which is the interest in the finality of criminal convictions. The adverse impact of a rule that would call into question numerous convictions previously thought to be final speaks for itself. It is true that, based on federal separation of powers considerations, this Court has held that its decisions interpreting the elements of a federal criminal offense must be applied retroactively even to persons finally convicted. But each State should be entitled to determine for itself the powers of its own judiciary and the manner by which its own legislation is interpreted.[1]

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[1] This brief does not address any of the other issues presented by this case.

SUMMARY OF ARGUMENT

A. To evaluate a claim that the State did not prove every element of a criminal offense beyond a reasonable doubt, one must first establish the elements of the crime. In this case, that means determining, under Pennsylvania law, the elements of the statutory offense of operating a hazardous waste facility without a permit. All the Pennsylvania courts that heard or reviewed Fiore's case, prior to his conviction becoming final, concluded that the relevant statute can apply to permit holders who significantly depart from the terms of their permit. Pursuant to that construction of the statute, the prosecution met its burden of proof and complied with *In re Winship*, 397 U.S. 358 (1970), at Fiore's trial. More than a year after Fiore's conviction became final, the Commonwealth Court of Pennsylvania and the Pennsylvania Supreme Court – addressing the appeal of Fiore's co-defendant – held that the possession of a permit is an absolute defense to the charge. On collateral review, the Pennsylvania courts refused to apply that decision retroactively to Fiore's final conviction. Only if that refusal was erroneous, and Fiore was constitutionally entitled to benefit from the result of his co-defendant's appeal, does he have a claim that the evidence was insufficient to convict him beyond a reasonable doubt.

B. This Court has long held that the Constitution does not require the retroactive application of changes in state law. To the contrary, the Court has allowed the states to look to their own jurisprudential philosophies and structures in defining the effects of new judicial decisions. *Bousley v. United States*, 523 U.S. 614 (1998), did nothing to change this. In *Bousley*, this Court held that its decisions interpreting the elements of federal criminal offenses must be applied retroactively even to final

convictions. That decision, however, was based upon federal separation of powers principles, not on a constitutional provision applicable to the States. Moreover, the longstanding rule that the Constitution permits the States to develop their own retroactivity rules regarding changes in state law has never distinguished between judicial law and statutory law. Although it may seem unfair that Fiore remains in prison pursuant to a now-rejected interpretation of a criminal statute, when retroactivity is an issue, any result other than complete retrospective application will always seem unfair to those individuals left unable to benefit from the new decision. This Court's decisions make plain that such alleged unfairness is not necessarily unconstitutional.

C. The States have utilized their freedom of action in this area to devise varying retroactivity rules based on their own views of competing considerations. No standardized rule, even if narrowly tailored to apply only to changes in statutory interpretation, could take into account this diversity of policy and interests. This Court's criminal procedure decisions, although not directly on point, demonstrate that a variety of legitimate factors can be considered when developing rules of retroactivity. In particular, one extremely important factor that States consider in their retroactivity analysis is their interest in the finality of criminal convictions. A mandatory federal rule requiring States to retroactively apply all changes in state law resulting from new statutory interpretations could have a broad and adverse impact on that interest. Moreover, some States may reasonably conclude that they do not want their courts to be swayed by concerns about finality when attempting to discern the most appropriate interpretation of a criminal statute.

ARGUMENT

I. THE FEDERAL CONSTITUTION DOES NOT REQUIRE THE RETROACTIVE APPLICATION OF THE PENNSYLVANIA SUPREME COURT'S *SCARPONE* DECISION TO FINAL CONVICTIONS

A. Fiore's Conviction Violates *Winship* Only if the *Scarpone* Decision Applies Retroactively to Final Convictions

Initially, the amici States do not dispute that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Nor is it disputed that an allegation of insufficient evidence presents a constitutional claim cognizable in a federal habeas corpus proceeding. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979). In evaluating such a claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. It necessarily follows that, in order to evaluate the sufficiency of the evidence, a court must first establish the essential elements of the crime under review. Therefore, with respect to the instant case, the question becomes what were the elements of the relevant crime, under Pennsylvania law, at the time of Fiore's conviction and subsequent appeal.

Among other crimes, Fiore and his co-defendant Dave Scarpone were charged with operating a hazardous waste

facility without a permit in violation of 35 Pa. Cons. Stat. § 6018.401(a) (1993). Although Fiore had obtained a permit, Pennsylvania asserted that the charge was proper because Fiore "so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation." Pet. App. 3. The trial court agreed with the prosecution's construction of the statute and Fiore was convicted. On appeal, Fiore asserted that the evidence was insufficient to convict him of operating an unpermitted facility because he possessed a permit. The Pennsylvania Superior Court rejected Fiore's claim and adopted the reasoning of the trial court. Specifically, that court held that Fiore's actions "represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was 'unpermitted.'" Pet. App. 4. The Pennsylvania Supreme Court subsequently denied Fiore's petition for allowance to appeal. There is no present dispute that substantial evidence shows that Fiore significantly departed from the terms of his permit. Accordingly, pursuant to the construction of the statute under which he was convicted and by which his convictions were affirmed on appeal, Fiore's trial complied with both *Winship* and *Jackson*.

More than a year after Fiore's convictions became final, the Commonwealth Court of Pennsylvania – addressing the appeal of Fiore's co-defendant – construed §6018.401(a) so as to make possession of a permit an absolute defense. On that basis, the court reversed the co-defendant's conviction, *Scarpone v. Commonwealth*, 596 A.2d 892, 895 (Pa. Commw. Ct. 1991), and the Pennsylvania Supreme Court affirmed. *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). Fiore thereafter sought post-conviction relief based on the result of his co-defendant's

appeal. Applying state retroactivity law that prohibits the application of new rules to final convictions, the Superior Court of Pennsylvania declined to apply *Scarpone* to Fiore's conviction. *Commonwealth v. Fiore*, 665 A.2d 1185, 1193 (Pa. Super. Ct. 1995), *appeal denied*, 675 A.2d 1243 (Pa. 1996). Only if the Superior Court erred, and Pennsylvania was required to apply *Scarpone* retroactively, might Fiore have a claim under *Winship* and *Jackson*. If *Scarpone* does not apply retroactively, Fiore stands properly convicted under the law as it existed at the time his conviction became final.

B. The Federal Constitution is Silent Regarding the Retroactivity of State Court Decisions Construing State Law

1. Historically, there were two basic schools of thought regarding retroactive application of changes in the law. *Linkletter v. Walker*, 381 U.S. 618, 622 (1965). One, which ruled the English common law, was that all judicial decisions were retrospective in nature. The roots of this view can be found in Blackstone's *Commentaries* in which "Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Id.* at 622-23 (quoting Blackstone, *Commentaries* 69 (15th ed. 1809)). The underlying principle of the Blackstone philosophy was that judges do not create law, but merely discover it. *Id.* at 623 (citing Gray, *Nature and Sources of the Law* 222 (1st ed. 1909)). A contrary approach, proffered by Austin, "maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite or generic statutory or common-law terms that alone are but the empty crevices of the law." *Id.* at 624. Under the Austin view, "rather than being

erased by the later overruling decision[, the prior law] is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed." *Id.* As noted by this Court, the more pragmatic approach of Austin began to gain acceptance around the middle of the 19th Century. *Id.*

Although this Court's retroactivity jurisprudence has been an evolving and complex area of the law, *see, e.g., Teague v. Lane*, 489 U.S. 288 (1988); *Griffith v. Kentucky*, 479 U.S. 314 (1987); *United States v. Johnson*, 457 U.S. 537 (1982); *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter*, 381 U.S. 618, one aspect has not changed: "the Federal Constitution has no voice" regarding the retroactive application of state court decisions construing state law. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932); *see also Wainwright v. Stone*, 414 U.S. 21 (1973). Put another way, the Constitution allows the States, when construing state law, to decide for themselves whether to adopt the Blackstone or Austin approach. "'A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.'" *Wainwright*, 414 U.S. at 24 (*quoting Sunburst Oil*, 287 U.S. at 364). This choice "may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Sunburst Oil*, 287 U.S. at 365.

2. Contrary to Fiore's suggestion, nothing in this Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), injects a constitutional component to his claim. *Bousley* followed the decision reached in *Bailey v. United States*, 516 U.S. 137 (1995), which held that a conviction for "use" of a firearm under 18 U.S.C. § 924(c)(1) requires the Government

to show "active employment of the firearm" and not mere possession. Bousley, who had pleaded guilty to violating § 924(c)(1) prior to the *Bailey* decision, sought habeas corpus relief on the ground that his guilty plea had been based upon an erroneous interpretation of the statute. *Bousley*, 523 U.S. at 618. This Court allowed for retroactive application, holding that "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid." *Id.* at 621.

That decision, however, was not based upon a constitutional provision applicable to the States. Rather, it was deemed required because "under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21. This premise, grounded in federal law, was the basis for the Court's finding that a contrary decision would "'necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). As the Third Circuit correctly pointed out below, "[b]ecause the *Bousley* decision rested on [this Court's] understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's refusal to give retroactive effect to a judicial interpretation of a state statute." Pet. App. 12 n.4. Whether a state court's judicial interpretation of a state statute violates the separation of powers structure in that state is plainly a question of state law. As related to this case, it is a question apparently never raised by Fiore in state court. Throughout the attacks on his conviction, it does not appear that Fiore ever alleged that the refusal of the Pennsylvania courts to retroactively apply the

Scarpone decision violated Pennsylvania's separation of powers doctrine.

Moreover, the longstanding rule that the silence of the Constitution permits States to develop their own retroactivity rules regarding changes in state law does not make a distinction between changes in common law and statutory law. In originally holding that "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward," this Court specifically stated that "[t]he alternative is the same whether the subject of the new decision is common law . . . or *statute*. . . ." *Sunburst Oil*, 287 U.S. at 365 (emphasis added). In fact, the retroactivity question at issue in that case concerned the judicial construction of a Montana statute. *Id.* at 359; *see also Wainwright*, 414 U.S. at 24 (Florida is not "constitutionally compelled . . . to make retroactive its new construction of [a] Florida statute").

Not surprisingly, then, the Third Circuit is not alone in affirming state court decisions that refused to apply new constructions of criminal statutes to persons whose convictions under the statutes were finally decided. For example, in *La Rue v. McCarthy*, 833 F.2d 140 (9th Cir. 1987), the defendant La Rue was convicted of second degree felony murder in violation of California Penal Code § 187, the underlying felony being child abuse. After his conviction became final, the California Supreme Court held in subsequent cases that § 187 is inapplicable when the underlying offense charged is any form of child abuse. *Id.* (citing *People v. Smith*, 35 Cal. 3d 798 (1984)). The California Supreme Court declined to reopen LaRue's case, and the Ninth Circuit affirmed the denial of his habeas corpus petition. The court concluded that "the refusal

by the California Supreme Court to apply the *Smith* rule retroactively might be unfair, but it is not unconstitutional. . . . The retroactivity of a state change of law is a state question and the federal Constitution has no voice upon the subject." *Id.* at 142 (citations omitted).

Likewise, in *Shields v. Wainwright*, 813 F.2d 1123 (11th Cir. 1987) (*per curiam*), the Eleventh Circuit addressed a habeas corpus petition filed by Shields, who had been convicted of kidnapping pursuant to a Florida statute. Subsequent to Shield's conviction, the Florida Supreme Court interpreted the statute for the first time, substantially narrowing the conduct previously thought to be encompassed by it. *Id.* at 1123 (citing *Carron v. State*, 427 So. 2d 192, 193 (Fla. 1983)). The Eleventh Circuit rejected Shields' claim that "his conviction should be vacated because his conduct during the course of the robbery did not constitute kidnapping under the Florida statute as it is now interpreted." 813 F.2d at 1123. The court deemed it irrelevant whether Shields' conduct would constitute a crime under the new interpretation of the statute because "the proper test is whether the evidence was sufficient for conviction according to the law as interpreted at the time of the conviction. Here the evidence was quite ample to prove each element of the crime of kidnapping as the statute defined the crime." *Id.* at 1124.

3. It may be that the rule established in *Bousley* seems fairer than one that would have Fiore remain in prison based upon a now-rejected construction of a statute. When retroactivity is the issue, however, anything short of pure and complete retroactive application will always seem unfair to the individual who does not get the benefit of the latter decision. It is an inherent part of the doctrine. But this Court's decisions make

plain that what may seem unfair is not necessarily unconstitutional. Each time this Court has declined to give a change in the law complete retroactive effect, someone has been there to point to the "unfair" impact on those left unable to take advantage of the new rule. *See, e.g., Linkletter*, 381 U.S. at 640-645 (Black, J., dissenting) ("Despite the Court's resounding promises throughout the *Mapp* [*v. Ohio*, 376 U.S. 643 (1961),] opinion that convictions based on such 'unconstitutional evidence' would 'find no sanction in the judgments of the courts,' Linkletter, convicted in the state court by use of 'unconstitutional evidence,' is today denied relief by the judgment of this Court because his conviction became 'final' before *Mapp* was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free."); *Solem v. Stumes*, 456 U.S. 638, 655 (1984) (Stevens, J., dissenting) ("because the unlawful interrogation took place prior to May 18, 1981, the date *Edwards* [*v. Arizona*, 451 U.S. 477 (1981),] was decided, the Court holds that respondent's statements are admissible in evidence even though they would have been inadmissible if they had been made after May 18, 1981").

Even this Court's current approach, allowing for retroactive application of new rules to cases pending at the time of the decision, but not to those finally decided, does not absolve the system of all ostensible inequities. Those individuals who remain incarcerated on the basis of *Teague* no doubt feel it is unfair to deny them the benefit of a new rule which, if applied to their case, would require their release from prison or, at the very least, a new trial. The relevant decisions plainly demonstrate that avoidance of all seemingly inequitable results is not the sole goal and guiding force when resolving retroactivity concerns. While Pennsylvania's refusal to apply

Scarpone retroactively to cases on collateral review may seem unfair to Fiore, it does not elevate his claim to one of constitutional dimension.[2]

C. The States Should Retain the Option to Decide Whether to Apply New Constructions of State Criminal Statutes Retroactively

1. The States have utilized their freedom of action in this area to devise different retroactivity rules based on varying views as to, among other considerations, the importance of finality, the equities involved, the nature of the statutes, and separation of powers principles. This can be seen in the few reported decisions addressing the retroactive reach of new judicial constructions of criminal statutes. A number of states, concluding that the interest in finality outweighs the other considerations, have adopted the rule that new judicial constructions of criminal statutes do not apply retroactively to final convictions. For example, in *People v. Hill*, 648 N.E.2d 455 (1995), the New York Court of Appeals considered whether to retroactively apply its decision in *People v. Ryan*, 626 N.E.2d 51 (N.Y. 1993), which construed a possession of a controlled substance statute for the first time. In *Ryan*, the court held that the state must prove beyond a reasonable doubt

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[2] Amici acknowledge that the facts of this case are unusual in that the same criminal offense is being construed differently with respect to two individuals who were tried together and convicted of the same crime based upon the same evidence. This Court, however, declined to grant certiorari with respect to Fiore's equal protection claim. Should this Court nevertheless determine that, in light of these circumstances, Fiore's continued incarceration violates due process, the amici States would respectfully request that any such holding be restricted to the unique situation presented.

that the defendant had knowledge of both the possession of the substance and its weight. *Hill*, 648 N.E.2d at 456. Hill, who was convicted of the offense prior to the *Ryan* decision, argued on appeal that the evidence "failed to establish that he knew or had reason to know the contraband weighed at least one-half ounce" and that "the trial court erred by refusing to instruct the jurors that the People were required to prove his knowledge of the weight of the contraband." *Id.* at 457. The New York Court of Appeals concluded that the new rule must apply retroactively only to cases pending on the date of the new construction. *Id.* at 458.

In *Kerns v. Grammar*, 416 N.W.2d 253 (Neb. 1987), the Nebraska Supreme Court considered whether a change in its interpretation of Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221, should be applied retroactively. At the time of Kerns' conviction, the Nebraska Supreme Court had "held that two prior offenses which were committed on the same date, prosecuted in the same information, and resulted in concurrent sentences could be treated as two separate convictions for the purposes of enhancing a sentence under § 29-2221." *Id.* at 255 (citation omitted). A year later, however, in *State v. Ellis*, 333 N.W.2d 391 (Neb. 1983), the court reinterpreted § 29-2221 by holding that "in order to warrant the enhancement of the penalty under . . . § 29-2221, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." *Kerns*, 416 N.W.2d at 256. After applying the considerations set forth in *Linkletter*, the Nebraska Supreme Court concluded that "the *Ellis* rule is not to be applied retroactively and is not to be applied to Kerns." *Id.* at 256.

Several States have reached a contrary result, requiring retroactive application of judicial constructions of criminal statutes even to final convictions. For example, in *State v. Howard*, 564 N.W.2d 753 (Wis. 1997), the Wisconsin Supreme Court considered a statute similar to the one at issue in *Bousley* and reached a result similar to that of this Court. In 1989, Howard was convicted of several drug-related offenses along with possessing a dangerous weapon, a penalty-enhancing violation. *Id.* at 756. In 1994, the Wisconsin Supreme Court required for the first time that, when a defendant is charged with that penalty enhancer, the statute requires the State to prove a nexus between the underlying crime and possession of the weapon. *Id.* at 757 (citing *State v. Peete*, 517 N.W.2d 149 (1994)). Howard sought post-conviction collateral relief on the basis that, at his trial, the jury did not receive an instruction on the nexus element. *Howard*, 564 N.W.2d at 757. The Wisconsin Supreme Court held that its decision in *Peete* would be applied retroactively. *See also Hickson v. State*, 640 P.2d 921 (Nev. 1982) ("Thus, retroactivity . . . is not at issue here. We must simply determine whether the acts for which Hickson was convicted were proscribed by the statute as originally defined by the legislature.") (citation omitted).

2. It does not matter, of course, which of the States have better weighed the competing considerations. What is important is that the States retain the freedom to make the decision for themselves. When a change in the law requires that a retroactivity determination be made, this freedom enables the States to evaluate the issue by taking into account different factors and the application of those factors to the specific case under review. No standardized rule, even if narrowly tailored to apply only to changes in the substantive interpretation of

statutes, could take into account all of the ways in which it would impact the 50 States.

The need to avoid a standardized rule in this area of the law is demonstrated by even a cursory review of this Court's struggles with, and decisions regarding, the retroactive application of its decisions altering criminal law. Although most of this Court's criminal retroactivity cases have addressed rules of procedure, not statutory interpretations, they make clear that a "one size fits all" approach to retroactivity is ill-advised. Instead, these cases make plain that retroactivity rules implicate a variety of competing interests, about whose weight reasonable people – including reasonable state legislators and jurists – could disagree. As this Court stated nearly 60 years ago, "questions [about retroactivity] are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

In *Linkletter*, the first of the modern criminal retroactivity decisions, this Court adopted a three-pronged analysis for claims of retroactivity. 381 U.S. at 636-38. Specifically considered was the purpose of the previous rule; the reliance placed upon the previous rule; and the effect on the administration of justice of a retrospective application of the previous rule. *Id.* Applying this approach, the Court held that the exclusionary rule of *Mapp* would apply only to trials commencing after the date of the decision. The Court consistently applied the *Linkletter* approach until its decision in *United States v. Johnson*, 457 U.S. 537 (1982), in which it

drew for the first time a distinction between pending cases and those finally decided.

That distinction was solidified in *Griffith v. Kentucky*, 479 U.S. 314 (1987), when the Court stated that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. Subsequently, in *Teague v. Lane*, 489 U.S. 288 (1988), this Court adopted a more definitive standard with respect to cases finally decided. The now-familiar rule provides that, with two exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310. Although the Court's retroactivity decisions are not controlling with respect to state law, they demonstrate that a variety of legitimate factors can be considered – and results obtained – when developing and applying rules of retroactivity.

3. Of particular importance to all States is the finality of criminal convictions. This Court's decisions clearly demonstrate that whether a particular decision will have a negative impact on finality is a legitimate concern in determining if it will be given retroactive effect. For example, in holding that the exclusionary rule of *Mapp* would not be applied retroactively, this Court stated that "there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost." *Linkletter*, 381 U.S. at 637. More recently, the *Teague* rules for retroactivity in habeas corpus cases in large measure stem from deference to the interest in finality. Finality is a principle this Court has repeatedly recognized as "essential to the operation

of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309.

It is partially out of concern for finality that the amici States urge this Court not to grant Fiore relief based on a retroactive application of *Scarpone*. Admittedly, the adverse effect on finality in this particular case would not be substantial. It appears that only one finally decided conviction would be affected. A mandatory federal rule, however, requiring States to retroactively apply changes in the law resulting from statutory interpretation could potentially have an extremely broad effect. If, for example, the statutory interpretation under which Fiore was convicted had been actively enforced in Pennsylvania for twenty years, the adverse impact on finality would be much more serious.

Moreover, a rule requiring state courts to apply statutory interpretations retroactively would not do away with the concern for finality, but would simply change the point in the process when it is considered. In other words, if a court knows retroactive application of a new interpretation will be required, it might determine that the price of declaring the change will be too costly. Some States may reasonably conclude that a court should not be faced with such concerns when attempting to reach the most appropriate result. When it comes to the reach and construction of state laws, this is a choice each State should be permitted to make for itself.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be affirmed.

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